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RECENT CASES.

AGENCY — UNDISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES WITH RESPECT TO THIRD PERSONS — UNDISCLOSED PRINCIPAL SURETY ON AGENT'S NOTE. — The defendant through her agent sought to borrow money from the plaintiff. The latter lent the money, but only after securing the signature of the defendant as surety on the note given as collateral by the agent. The plaintiff acted in ignorance of the fact that the loan was secured for the defendant. The note was not protested at maturity, and the plaintiff sought to recover against the defendant as undisclosed principal. *Held*, that the plaintiff cannot recover. Two judges dissented. *Brown* v. *Lanpher*, 35 N. Y. L. J. 1651 (N. Y., Sup. Ct., App. Div., July, 1906).

Though the defendant was not liable on the note, it seems that he should have been held in *assumpsit*, which was the nature of the count in this case. *Pentz* v. *Stanton*, 10 Wend. (N. Y.) 271. The court based its decision to the contrary on the ground that the defendant "was not an undisclosed principal," but "an open, declared, and active participant in the transaction." This seems to be a misconception of the true principle underlying the rule as to the liability of an undisclosed principal, which, it is conceived, is that the third party has in all cases a right to choose whether or not he shall hold the principal liable. This choice is ordinarily made at the time of entering into the contract, but as it is clear that there cannot be any election as to holding the principal when he is undisclosed, the rule results that in such case the third party may make his election at any time subsequent to the discovery of the principal. *Thomson* v. *Davenport*, 9 B. & C. 78. The fact that in this case the principal took part in the transaction as surety should have no effect to destroy his liability as having been an undisclosed principal, for since the fact of the agency was unknown to the third party, he could have made no choice not to hold the principal. See *Railton* v. *Hodgson*, 4 Taunt. 576 *n.* (a).

BANKRUPTCY — EXEMPTIONS — LIFE-INSURANCE POLICY. — The National Bankruptcy Act allows a bankrupt who holds an insurance policy which has "a cash surrender value" to pay such value to the trustee in bankruptcy and hold the policy henceforth free from creditors. NAT. BANKR. ACT, § 70 a (5). A bankrupt held three tontine policies which did not expressly give the holder a right to a cash surrender value, but it was the invariable custom of the insurance company to allow such an option on policies of that kind. *Held*, reversing the Circuit Court, that the bankrupt might retain the policy. *In re Mertens*, 142 Fed. Rep. 445 (C. C. A., Second Circ.).

For a discussion of the principles see 19 HARV. L. REV. 377, suggesting this rule and criticising cases *contra*.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — TRUSTEE IN BANKRUPTCY NOT EQUIVALENT TO JUDGMENT CREDITOR. — The appellant sold machinery to a corporation of which the respondent was trustee in bankruptcy on a conditional sale contract without filing the contract as required by a statute of Ohio to make it good against creditors. The machinery was installed in the corporation's factory. *Held*, that, adopting the Ohio court's interpretation that an unfiled contract of conditional sale is void as to only those creditors who have fastened upon the property by some specific lien, this conditional sale is valid as against the trustee. *York Manufacturing Co.* v. *Cassell*, 201 U. S. 344.

This decision, the first on this exact point since the passage of the Bankruptcy Act of 1898, is based chiefly on the grounds that the trustee in bankruptcy stands merely in the bankrupt's shoes. Apparently no notice was taken of § 67*a*, providing that "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." U. S. COMP. STAT. 1901, p. 3449. The decision of the lower court, hereby reversed, and another Circuit Court of Appeals case present what is perhaps a better view. *York Manufacturing Co.* v. *Cassell*, 135 Fed.

Rep. 52; *In re Pekin Plow Co.*, 112 Fed. Rep. 308; see *In re Thorp*, 130 Fed. Rep. 371. The institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of creditors of all the property of the bankrupt which might have been seized by the creditors. Therefore, when such proceedings have been instituted, there would seem to be the effectual seizure required by the interpretation of the Ohio statute. For further discussion of the general question, see 16 HARV. L. REV. 370.

BANKRUPTCY — PROVABLE CLAIMS — ANTICIPATORY BREACH OF CONTRACT. — The petitioner, who had made a contract to deliver supplies over five years following, claimed that the other party's adjudication in bankruptcy by involuntary proceedings constituted a breach of the contract, and wished to be allowed to prove his damages against the estate. The trustees in bankruptcy had elected not to carry out the contract. *Held*, that adjudication in bankruptcy is not equivalent to a refusal of the bankrupt to perform or to permanent disability to perform, and that therefore no debt exists provable against the estate. *In re Imperial Brewing Co.*, 143 Fed. Rep. 579 (Dist. Ct., W. D. Mo.).

By the Bankruptcy Act of 1898 the provability of a claim depends upon its status at the time the petition is filed. U. S. COMP. STAT. 1901, p. 3447. When insolvency occurs, the assignee or trustee in bankruptcy has a right to fulfill any of the contracts of the bankrupt. *Cf. Brassel* v. *Troxel*, 68 Ill. App. 131. But in this case the trustee had not elected to fulfill the contract. By the ordinary doctrine of anticipatory breach, if the vendee refuses to perform, or disables himself from performing the contract, a breach is thereby committed, and he is immediately liable for damages on the whole contract. *Roehm* v. *Horst*, 178 U. S. 1. When the creditor elects to treat bankruptcy as a breach, as he has done in the present case by offering to prove his claim, and the trustee does not exercise his election to go on, the adjudication should be equivalent to repudiation or self-disablement, and the debt, thereupon a present liability, should be provable against the bankrupt estate. *In re Pettingill*, 137 Fed. Rep. 143. The court seems unwisely to limit the logical extension of the theory of anticipatory breach.

CARRIERS — LIMITATION OF LIABILITY — LIABILITY TO ADMINISTRATOR OF ONE WHO HAS WAIVED HIS RIGHTS AGAINST CARRIER. — In consideration of reduced charges, the deceased agreed that the railroad should not be liable for any damage to him or his goods due to its negligence. The New York Code allows the administrator an action for death when the deceased could have recovered for the injury had it not proved fatal. *Held*, that, under this statute, the administrator may recover from the carrier for the death caused by its negligence. *Hodge* v. *Rutland Rd. Co*, 112 N. Y. App. Div. 142.

By this decision New York adopts the prevailing rule. See 13 HARV. L. REV. 309; 17 *ibid.* 491.

CARRIERS — NEGLIGENT DELAY — ACT OF GOD. — A connecting carrier, in spite of continued explicit warnings from the U. S. Weather Bureau, negligently detained goods at a station until they were overtaken by a flood. *Held*, that the original carrier is liable. *Wabash R. Co.* v. *Sharpe*, 107 N. W. Rep. 758 (Neb.).

There is some conflict of authority as to whether or not unnecessary delay on the part of a carrier, without other negligence, consequent upon which is the destruction of goods in transit by act of God, renders the carrier liable. The better view would seem to be that mere nonfeasance is in such cases too remote a condition to be regarded as part of the legal cause of the damage. *Morrison* v. *Davis*, 20 Pa. St. 171, approved in *Denny* v. *N. Y. C. R. Co.*, 13 Gray (Mass.) 481; *contra*, *Read* v. *Spaulding*, 30 N. Y. 630. But the decision in the principal case is clearly correct, since the negligent delay was here not a mere antecedent condition of the loss, but a present co-operating cause, continuing up to the time of the disaster. Moreover, a flood against which, by reason of previous warning, provision could have been made in ample time would not seem to fall within any proper definition of an act of God. See further, 10 HARV. L. REV. 310.

CARRIERS — PERSONAL INJURIES TO PASSENGERS — UNSAFE APPROACHES TO STATIONS. — The plaintiff received personal injuries through the openly defective condition of a stairway indicated and constantly used as an approach to the defendant's station. This stairway, the majority of the court assumed, was owned and maintained by the city. There were other suitable approaches to the station. *Held*, that the defendant is liable. *Schlessinger* v. *Manhattan Ry. Co.*, 98 N. Y. Supp. 840.

It is the duty of a railroad company to use proper care that safe means of access to and from its stations be provided for the use of passengers. Undoubtedly, therefore, the company is liable for personal injuries resulting from defective passageways negligently maintained by it on its own premises. Furthermore the same liability has been imposed for defective approaches, apparently open to use by passengers, both when they are on the railroad's premises but maintained by other parties, and when they are on another's premises but maintained by the railroad. *Del., etc., R. R. Co.* v. *Trautwein*, 52 N. J. Law 169; *Tobin* v. *Portland, etc., R. R. Co.*, 59 Me. 183. The present decision with two somewhat similar adjudications tends to show that the carrier would generally be held liable, although the defective approach was owned and maintained by another and on another's premises. See *Cotant* v. *Boone, etc., Ry. Co.*, 125 Ia. 46; *Gulf, etc., Ry. Co.* v. *Glenk*, 9 Tex. Civ. App. 599, 606. Here, however, the liability cannot well be for the defective condition of the approach itself, for the railroad company had no legal right to make repairs on another's property. The railroad's wrong really lay in not guarding its own premises so that passengers would not reasonably be led to use the dangerous passages therefrom. *Cf. Burgess* v. *Great Western Ry. Co.*, 6 C. B. (N. S.) 923.

CHARITIES AND TRUSTS FOR CHARITABLE USES — WHAT CONSTITUTE CHARITIES. — TRUST FOR PATRIOTIC PURPOSES. — A testatrix by her will left certain funds to be invested by specified trustees, and directed that a part of the income be given annually to the ringers for the time being of the parish church, who should ring a peal of bells on every May 29 in commemoration of the happy restoration of the monarchy to England. *Held*, that the provision is a valid charitable gift. *In re Pardoe-McLaughlin* v. *Atty.-General*, 22 T. L. R. 452 (Eng., Ch. D., Apr. 10, 1906).

Under the broad definition given to the term "charitable trusts" by the courts at the present day, the present case is undoubtedly correct. *Webb* v. *Oldfield*, [1898] 1 Ir. Ch. 431. The term covers not only such objects as would be understood by it in its popular sense, but also anything which tends to benefit a number of people by bringing their minds or hearts under the influence of education and religion, lessening public burdens, or by conducing to their social betterment. *Garrison* v. *Little*, 75 Ill. App. 402. Accordingly, gifts in trust for anti-vivisection societies, temperance societies, vegetarian societies, societies for studying and curing diseases of animals useful to man, and the like, as well as gifts for strictly educational or religious purposes, have been upheld as charitable trusts. *In re Foveaux*, [1895] 2 Ch. 501; *Harrington* v. *Pier*, 105 Wis. 485; *Webb* v. *Oldfield, supra; University of London* v. *Yarrow*, 1 De G. & J. 72. A patriotic trust, as in the principal case, can be supported either as educational, for it instructs and reminds the people of their history, or as one for social betterment, since it brings the people to a greater realization of their duty to their country and their neighbor. In either aspect, it is a valid charitable trust. *Sargent* v. *Cornish*, 54 N. H. 18.

CONFLICT OF LAWS — EFFECT OF CONTRACTS — DAMAGES RECOVERABLE FOR BREACH IN DIFFERENT STATE. — A telegraph message sent in Indiana to the plaintiff in Kentucky was delayed in Indiana, with the result that the plaintiff suffered mentally through the delay in delivery. He sued in Kentucky, and obtained judgment. The defendant appealed. *Held*, that the defendant's liability is governed by the law of Kentucky. *Western Union Telegraph Co.* v. *Lacer*, 93 S. W. Rep. 34 (Ky.).

For a case allowing recovery in the state in which the message was sent, and for a discussion of the principles involved, see 17 HARV. L. REV. 354.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — EFFECT OF WILLS ACT ON WILL OF ENGLISHWOMAN MARRYING SCOTCHMAN. — The English Wills Act of 1837 provides that "every will made by a man or woman shall be revoked by his or her marriage." This act does not apply to Scotland. An Englishwoman after having made her will married a domiciled Scotchman. After they had lived in Scotland some time, she died. *Held*, that the will is not revoked, since by her marriage the testatrix became Scotch, so that the Wills Act did not apply to her. *Westerman* v. *Schwab*, 43 Sc. L. Rep. 161.

The exact point raised by this case has apparently never before been adjudicated. The principal argument in favor of revocation seems to have been that the English Wills Act has the effect of reading into every person's will a clause that the will should be revoked before marriage. It has been held, however, that if a Frenchwoman marries a domiciled Englishman, her will, on which the English act would have no effect when made, is revoked by marriage. See *In re Martin*, [1900] P. 211. This would seem to show that the act operates not because of any tacit condition annexed to the will, but directly at the time of the marriage. Following this interpretation of the act, the court decided the case on the general principle that the civil effect of the marriage should be determined by the law of the matrimonial domicile, which is usually the domicile of the husband. See *Mason* v. *Homer*, 105 Mass. 116. It is well settled that the distribution of personal effects as between wife and husband, when of different jurisdictions, falls within this rule. *Mason* v. *Fuller*, 36 Conn. 160. The adoption of this principle offers a further means of harmonizing the principal case with the case cited above, where the effect of the marriage was to revoke the instrument. See *In re Martin*, *supra*.

CONSPIRACY — CRIMINAL LIABILITY — CONSPIRACY TO COMMIT CRIME REQUIRING PLURALITY OF ACTORS. — An indictment charged that the four defendants — of whom two were members of a Detroit company and two traffic managers of a railroad doing an interstate business, — a member of the Detroit company, since deceased, and others to the jurors unknown, had conspired with one another and with two persons who acted as agents both for the Detroit company and for two New York corporations, to procure the railroad to give rebates on sugar shipped by the New York corporations to the Detroit company; and alleged overt acts, culminating in the giving of rebates by the traffic managers to the two agents for the benefit of the Detroit company and the New York corporations. *Held*, that there is no conspiracy. *United States* v. *Guilford et als.*, 38 Chi. Leg. N. 411 (Dist. Ct., S. D. N. Y., July, 1906). See NOTES, p. 62.

CONSPIRACY — CRIMINAL LIABILITY — DAMAGE TO PERSON IN HIS TRADE OR CALLING. — In accordance with an agreement of theatre managers to exclude the complainant, a dramatic critic, from their play-houses, he was refused admission to certain performances and forcibly prevented from entering. *Held*, that, under the Penal Code of New York, such agreement is not criminal unless the sole motive is to inflict harm. *People* v. *Flynn*, 100 N. Y. Supp. 31.

The class of criminal conspiracies where there is contemplated, in the means or the end, no act which would be tortious or criminal if done by an individual, is hard to define. Many such conspiracies derive their criminality from the danger to the individual of the combined exercise of an imperfect right which would be comparatively harmless and therefore negligible by the law when exercised by a single person. *Smith* v. *People*, 25 Ill. 17; *Mifflin* v. *Com.*, 5 Watts & S. (Pa.) 461. Even where the agreement is to do a thing perfectly lawful for the individual, the combination may have such power for oppression as to be criminal. *State* v. *Donaldson*, 32 N. J. Law 151; *Com.* v. *Carlisle*, Bright. (Pa.) 36. Whether such agreements are criminal seems to depend on whether their purpose is justifiable. Combinations which work ruin to individuals in fair competition are clearly lawful, and so are peaceful strikes by workmen to secure an advance in their own wages. *Mogul Steamship Co.* v. *McGregor*, L. R. 23 Q. B. 598; see *Master Stevedores' Assn.* v. *Walsh*, 2 Daly (N. Y.) 1. But conspiracies to inflict wanton harm on an individual in his

trade or calling, whatever the means used, are criminal. *King* v. *Eccles*, 1 Leach 274. The principal case can be supported, if at all, on the ground that the parties to the agreement were only taking necessary and reasonable steps to protect their business interests, and were therefore justified.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — LEGISLATIVE REGULATION OF GAS RATES. — In a suit by a gas company to recover the price of gas furnished the city of New York the city set up the defense that the price was unreasonable, although less than the maximum rate fixed by the legislature. *Held*, that the statutory fixing of a maximum rate is equivalent to express legislative authority to charge up to that rate; and that no constitutional right of the consumer is thereby impaired, even though the legislative rate is unreasonably high. *Brooklyn Union Gas Co.* v. *The City of New York*, 35 N. Y. L. J. 553 (N. Y., Sup. Ct.), 2 Dept., May 14, 1906.

It has repeatedly been held that governmental regulation of the charges of public service corporations must not go so far as to force them to operate at no profit, since this would be in substance confiscation of their property without due process of law. *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307.; *C. M. and St. P. R. Co.* v. *Minnesota*, 134 U. S. 418. But the principal case is clearly right in holding that legislative authorization of unreasonably high rates does not work a corresponding confiscation of the consumer's property. True, the consumer has the common law right to be charged only a reasonable price for the services or commodities of a corporation affected with a public interest. *Aldnutt* v. *Inglis*, 12 East 527. But he has no property, no vested interest, in this or any other rule of the common law. *Munn* v. *Illinois*, 94 U. S. 113. If his expectation that in future he will secure such commodities at reasonable rates is destroyed by legislative alteration of the common law, he has suffered no loss of property without due process of law. He may refuse to buy, or he may petition the legislature to change the law. He has no remedy in the courts.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTORY REMEDIES AGAINST UNINCORPORATED ASSOCIATIONS. — A statute allowing suits against unincorporated associations in the associate names, with process served merely upon certain of their officers, provided for judgments against the associations which should be binding upon all the members so that they might be held liable individually upon final process. *Held*, that the statute is not in violation of the fourteenth amendment to the Constitution of the United States as involving a taking of property without due process of law. *Patch Mfg. Co.* v. *Capeless*, 63 Atl. Rep. 938 (Vt.). See NOTES, p. 58.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM OF CONTRACT. — *Held*, that § 171 *a* of the New York Penal Code making it a misdemeanor for an employer to require of an employee, as a condition of employment, that he shall not join a labor union, is unconstitutional. *People* v. *Marcus*, 35 N. Y. L. J. 839 (N. Y., Ct. App., May 25, 1906).

For a discussion of the principles involved, see 19 HARV. L. REV. 368.

CONSTRUCTIVE TRUST — MISCONDUCT BY NON-FIDUCIARIES — BANK RECEIVING TAX RECEIPTS ILLEGALLY DEPOSITED. — A county treasurer without legal authority deposited tax receipts in a private bank for collection, the bank knowing the treasurer's lack of authority. The bank became insolvent. *Held*, that the county has a preferred claim for the amount collected. *Page County* v. *Rose*, 106 N. W. Rose, 744 (Ia.).

The ordinary relation arising on the deposit of money in a bank is that of debtor and creditor. *Marine Bank* v. *Fulton Bank*, 2 Wall. (U. S.) 252. It is well settled, however, that if a bank receives a deposit knowing of its insolvency it holds the money as trustee. *Wasson* v. *Hawkins*, 59 Fed. Rep. 233. The same rule should hold if a bank receives a deposit knowing that it has no right to do so. *Merchants Nat. Bank* v. *School District*, 94 Fed. Rep. 705; *Board of Fire & Water Com.* v. *Wilkinson*, 119 Mich. 655. In such cases the depositor can recover his whole deposit on the bank becoming insolvent, since the law presumes that no part of the trust fund is paid out so long as an amount equal to it remains in the bank. *Sherwood* v. *The Central Michi-*

gan Savings Bank, 103 Mich. 109; see 19 HARV. L. REV. 520. Since the bank knew that it had no legal right to make the collections, the present decision seems correct on the ground of a constructive trust. A dictum, however, that even if the receipt were justified the bank would be a trustee seems wrong; for if the bank received the money in ignorance of the rights of third parties the relation of debtor and creditor would then arise. *Richardson* v. *New Orleans Debenture Redemption Co.*, 102 Fed. Rep. 780.

CORPORATIONS — STOCKHOLDERS — INDIVIDUAL LIABILITY OF TRANSFERRER OF STOCK OF INSOLVENT BANK. — A shareholder in a national bank after knowledge of its insolvency sold his stock to escape the statutory liability to assessment. More than two years later the bank failed, and the plaintiff as receiver brought suit to recover on the assessment. *Held*, that the defendant is liable only to those parties who were creditors before he transferred his stock. Three justices dissented. *McDonald* v. *Dewey*, U. S. Sup. Ct., May 28, 1906.

The rule limiting the liability of the transferrer to those persons who were creditors before the stock was transferred is a clear limitation of the general propositions of law made by the court in earlier cases. In those cases the statement was made that such a fraudulent transfer had no effect. *Bowden* v. *Johnson*, 107 U. S. 251; see *Nat. Bank* v. *Case*, 99 U. S. 628; *Stuart* v. *Hayden*, 169 U. S. 1. Although in two of the cases cited the statements were dicta, the rule of law was laid down as well established. The present decision does not purport to overthrow the Bowden case, but that is, in reality, its effect. The court contends that the requirement of the keeping of a correct list of shareholders is for the benefit of persons dealing with the bank, and that creditors who contract do not look to former shareholders and should not have the benefit of their liability. The minority's contention that the statute either imposes liability up to the time of the bank's failure or not at all, seems hard to answer. Even though the court's conclusion be technically sound, which is doubtful, the result reached is unfortunate.

EMINENT DOMAIN — COMPENSATION — STRUCTURE PLACED UPON LAND BEFORE CONDEMNATION. — A village before starting condemnation proceedings constructed a reservoir on the defendant's land against his express command. *Held*, that the plaintiff must pay the defendant the market value of the land, as enhanced by the construction of the reservoir. *Village of St. Johnsville* v. *Smith*, 184 N. Y. 341.

This decision is based upon the rule that structures erected by trespassers belong to the land-owner. *Graham* v. *R. R. Co.*, 36 Ind. 463. Since the plaintiff entered without any authorization, it is considered in no better position than any other trespasser. Most courts, however, hold that the plaintiff is not an ordinary trespasser, since it can acquire the land under its power of eminent domain, so that the owner is entitled to redress merely for the land and any incidental damage from the trespass. *Newgrass* v. *Ry. Co.*, 54 Ark. 140. It would seem that the "just compensation" required by the Constitution means this lower measure of damages, and not that the plaintiff should be penalized. See LEWIS, EMINENT DOMAIN, 2 ed., 1144–1145; *R. R. Co.* v. *Armstrong*, 46 Cal. 85. A distinction which has been applied when a railroad is the trespasser is that, as the company wants only an easement, it does not intend to make its structures of such permanency as to become part of the realty. *Justice* v. *R. R. Co.*, 87 Pa. St. 28. Of course the land-owner can always recover, sometimes in trespass, sometimes in the condemnation proceedings themselves, any incidental damage resulting from the entry. *Bethlehem Co.* v. *Yoder*, 112 Pa. St. 136.

EQUITY — JURISDICTION — BILL BY RECEIVER AGAINST DELINQUENT DIRECTORS OF CORPORATION. — The complainant, as receiver of a bankrupt corporation, filed bills in equity against the defendants to recover damages for alleged illegal conduct in the course of their duty as directors of the corporation. The defendants objected that the court had no jurisdiction, on the ground that the proper remedy was an action at law. *Held*, that the action is within the jurisdiction of equity. *Emerson* v. *Gaither*, 64 Atl. Rep. 26 (Md.).

Where the directors of a corporation have been guilty of misfeasance the corporation may file a bill in equity to compel them to account therefor. *Citizens Loan Assn.* v. *Lyon*, 29 N. J. Eq. 110. There may be also a concurrent remedy at law. *Thompson* v. *Greeley*, 107 Mo. 577. And in some code states the nature of the action may be determined by the relief demanded. *Horn Silver Mining Co.* v. *Ryan*, 42 Minn. 196. Some cases tend to restrict the remedy to an action at law only, unless clear and special grounds for equitable relief are shown. *Dykman* v. *Keeney*, 154 N. Y. 483. In general a trustee, receiver, or assignee in bankruptcy succeeds to the title of the corporation and to its rights of action. *White* v. *Haight*, 16 N. Y. 310. It follows, therefore, that he may assert against delinquent directors whatever rights of action the corporation could have asserted, and enforce them by the appropriate remedy. *Stephens* v. *Overstolz*, 43 Fed. Rep. 771. The better procedure, however, seems to be a bill in equity, because of the complicated questions which often arise, and in order to avoid multiplicity of suits. The tendency of authority is this way. *Briggs* v. *Spaulding*, 141 U. S. 132; *Appeal of McCarty*, 110 Pa. St. 379.

EQUITY — SPECIFIC PERFORMANCE — LACK OF MUTUALITY OF REMEDY AS DEFENSE. — In consideration of the plaintiff's agreement to furnish the defendant electric controllers for fifteen years, the defendant bound himself, with stipulation for liquidated damages, not to manufacture such controllers. The defendant did so manufacture and the plaintiff sought to enjoin him. *Semble*, that, as plaintiff cannot be decreed specifically to perform his agreement, there is not the requisite mutuality of remedy. *General Electric Co.* v. *Westinghouse Electric Co.*, 144 Fed. Rep. 458 (Circ. Ct., N. D. N. Y.). See NOTES, p. 57.

EVIDENCE — ADMISSIONS — OFFER TO COMPROMISE IN CRIMINAL CASE. — In a prosecution for rape the state gave evidence of an offer of money by the defendant to the foster-father of the prosecutrix to quash the proceedings. *Held*, that the evidence was wrongly admitted. *Sanders* v. *State*, 41 So. Rep. 466 (Ala.).

In civil actions an offer to compromise is not receivable as an admission of liability, either express or by conduct. *Tennant* v. *Dudley*, 144 N. Y. 504. But an unqualified statement conceding a claim of the opponent's is receivable, though it occur as part of the attempt to compromise. *Rose* v. *Rose*, 112 Cal. 341. The reason commonly assigned is that offers to compromise are not evidential; they imply a desire for peace, not a concession of liability. See 2 WIGMORE, EV., § 1061. But such offers may be highly evidential, — as where the offer amounts to a large part of the claim. A sounder view is that such offers are privileged by the public policy that disputes be amicably adjusted. *Perkins* v. *Concord Ry.*, 44 N. H. 223. Though as an original question the reason for this privilege might seem to extend to unqualified as well as to hypothetical offers, courts have confined it to the latter. *Dickinson* v. *Dickinson*. 9 Met. (Mass.) 471. The rule in criminal cases depends upon the theory accepted. If such offers do not evidence civil liability, neither do they evidence criminal guilt. The only square decision in point, besides the one under discussion, so holds. *Wilson* v. *State*, 73 Ala. 527. As matter of privilege, however, it is not public policy that criminal prosecutions be compounded, especially where the state, the real injured party, is not offeree.

EXTRADITION — INTERNATIONAL EXTRADITION — EXTRADITION FOR ONE OFFENSE AND IMPRISONMENT FOR ANOTHER. — The relator was indicted for conspiring to defraud the United States, and in another indictment for procuring the admission of goods into the United States in violation of statute. He was duly convicted and sentenced on the conspiracy charge, and having been released on bail pending an appeal fled to Canada after the affirmance of his conviction. The requisition of the United States was refused. Thereupon he was demanded for the crime charged in the second indictment and was surrendered to the United States. While in the hands of an officer he was arrested

on a warrant sworn out on the conspiracy charge, and was imprisoned. *Held*, that the relator is improperly detained. *In re Charles C. Browne*, 35 N. Y. L. J. 1695 (Circ Ct., S. D. N. Y., Aug., 1906).

Article three of the convention of 1889 with Great Britain declares that "No person surrendered . . . shall be triable or be tried for any crime or offense committed prior to his extradition other than the offense for which he was surrendered," until he has had an opportunity to leave the country. The government contended that by virtue of the omission of the word "punished" a person extradited for a specific offense might be punished on a conviction of another offense obtained prior to his extradition. But by article seven of the same convention there is provision for the extradition of criminals whose sentence is unexecuted, and the government's contention would permit indirect action under article three when there had been failure to extradite under article seven. Before the convention of 1889 it had been decided that a surrendered person could be arrested or tried only for the offense for which he was extradited. *United States* v. *Rauscher*, 119 U. S. 407. As a construction favorable to the government would stultify article seven and change the previously existing law without a clear expression of such intention in the convention, the court's decision seems eminently sound.

ILLEGAL CONTRACTS — EFFECT OF ILLEGALITY — WHETHER ILLEGALITY BARS RECOVERY FOR FRAUD. — The defendants induced the plaintiff to bet upon a foot-race between two of their number by telling him that it was prearranged that a certain one should win. The other contestant won, as the defendants had all the time planned that he should. Upon discovering that the defendants constantly held such races under their auspices, the plaintiff sued to recover his losses. *Held*, that the plaintiff is not barred by his own illegal conduct. *Hobbs* v. *Boatright*, 93 S. W. Rep. 934 (Mo., Sup. Ct.). See NOTES, p. 60.

INFANTS — CONTRACTS — INFANT ENJOINED FROM BREACH OF CONTRACT. — The plaintiff, a milk-dealer, entered into a contract with the defendant, a minor, for the latter's service in delivering milk. The contract stipulated that the defendant, on leaving the employment, was not to solicit the trade of the plaintiff's customers during a stated period. The defendant left the employment and solicited the trade of the plaintiff's customers within the prohibited time. *Held*, that the infant should be enjoined. *Mutual Milk and Cream Co.* v. *Prigge*, 112 N. Y. App. Div. 652. See *Notes*, p. 64.

LANDLORD AND TENANT — COVENANT IN LEASE — DAMAGES FOR PERSONAL INJURIES. — As a result of the landlord's failure to heat the apartments, as he had promised to do, the lessee's infant child caught pneumonia and died. The lessee sued to recover for the death of the child, for physician's fees, and for the services of an undertaker. *Held*, that such damages are too remote. *Dancy* v. *Walz*, 112 N. Y. App. Div. 355.

The refusals to give damages for personal injuries resulting from the breach of a covenant to repair leased premises have been based on the argument that the damages were too remote. *O'Gorman* v. *Teets*, 20 N. Y. Misc. 359. There is some difference, however, between such a covenant and one to heat the premises, and it is certainly arguable that sickness and death may be the immediate and natural results of a breach of the latter. Moreover, landlords have been held liable when personal injuries were caused by the breach of covenants to repair such parts of premises as remained under their own general control. *Looney* v. *McLean*, 129 Mass. 33; *Dollard* v. *Roberts*, 130 N. Y. 269. There seems to be good reason for regarding the present case in the same way, considering the control exercised by the landlord over the heating plant in a modern apartment house. The court treated the covenant to heat as identical in principle with one to repair, and did not consider the apparently valid distinction noted above.

LEGACIES — ADEMPTION — WHETHER DOCTRINE RESTS ON INTENTION WHEN INVOKED IN FAVOR OF STRANGER. — A testator left a legacy to his

adopted daughter, and made her and a third person residuary legatees. After making the will he made numerous gifts to the daughter. *Held*, that, as a matter of law, neither the bequest nor the residuary legacy to her is adeemed by the amount of such gifts. *Pomfrey* v. *Fryer*, 54 W. R. 625 (Eng., Ch. D., May 17, 1906).

It is well settled that whether or not a legacy is adeemed rests on the intent of the testator. *Cowles* v. *Cowles*, 56 Conn. 240; *Richards* v. *Humphreys*, 15 Pick. (Mass.) 133. The presumption is that, where a gift is made to a child by a testator in his lifetime, it is intended as a satisfaction *pro tanto* of a legacy previously given in a will, and the burden of proof is on the person seeking to show the contrary. See *Carmichael* v. *Lathrop*, 108 Mich. 473; 10 HARV. L. REV. 52. The present decision is supported by one other. *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670. These are apparently the only cases which lay down as a rule of law that the doctrine of ademption will not be applied where the result is to increase the gift to a residuary legatee who is a stranger. Unless the doctrine of ademption is to be repudiated altogether, it appears more in accord with principle to regard the circumstance that the gift to a stranger will be increased if the legacy is adeemed, merely as evidence of the testator's intention.

MORTGAGES — TRANSFER OF RIGHTS AND PROPERTY — SURRENDER OF LEASE GIVEN UNDER STATUTE BY MORTGAGOR. — Under an English statute giving the right, a mortgagor leased the mortgaged premises for a term of years. Before the end of the term, the lessee's executors surrendered the premises to the devisees of the mortgagor. The mortgagee sued the lessee's executors for rent. *Held*, that the mortgagee can recover, since a surrender could only be to him, the immediate reversioner. *Robbins* v. *Whyte*, 94 L. T. 287 (Eng., K. B. D., Nov. 29, 1905).

At common law a mortgagor cannot make a lease which will bind the mortgagee. *Rogers* v. *Humphreys*, 4 Ad. & E. 299. But by the English Conveyancing Act of 1881 a mortgagor in possession might make a lease binding on the mortgagee. *Wilson* v. *Queen's Club*, [1891] 3 Ch. 522. The mortgagee, after the making of the lease, holds a reversionary estate expectant on the term granted by the lease. *Municipal Permanent Investment Bldg. Soc.* v. *Smith*, 22 Q. B. D. 70. The general rule is that a surrender must be made to the holder of the immediate reversion. *Cadle* v. *Moody*, 30 L. J. Exch. 385. In accordance with this rule the court holds that the surrender must be made to the mortgagee in order to be valid. The fact that the statute has given the mortgagor the right to make a valid lease does not necessarily imply that the right to accept surrenders of such leases is also given. For, under the common law, a right to lease given to the mortgagor by the mortgage instrument does not give a right to accept a surrender. See *Miles* v. *Murphy*, 5 Ir. Law 383. The court has properly construed the statute strictly, limiting the change in the common law to the express provisions of the act.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — PRIVATE NUISANCE MAINTAINED IN HIGHWAY BY INDEPENDENT CONTRACTOR. — A sewer contractor unnecessarily and wantonly piled dirt in the street and on a vacant lot adjoining the plaintiff's premises. Surface water was thereby precipitated into the plaintiff's cellar, causing damage. The obstruction remained for eight months to the knowledge of the city and in spite of complaint. *Held*, that the city is liable for a private nuisance. *Frick* v. *Kansas City*, 93 S. W. Rep. 351 (Mo.).

A municipal corporation is bound to keep its streets in reasonably safe condition. The duty to repair within a reasonable time after notice of defect is a positive one and cannot be delegated. *City of Chicago* v. *McCarthy*, 75 Ill. 602. It follows that the municipality is liable for damage due to defective highways, though caused by the negligent or wilful conduct of an independent contractor. *Storrs* v. *City of Utica*, 17 N. Y. 104. The decided cases would seem to indicate that this duty is owing only to travelers on the highway, their persons and property. The present case goes a step further in extending the duty to abutters.

It finds support in one English case. *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335. There seems to be no valid reason for confining the doctrine. This duty is not one of insurance to be narrowly applied. Except where necessarily incident to public improvement, a city owes the ordinary duty not to maintain a private nuisance. *Ashley* v. *Port Hudson*, 35 Mich. 296; *Miller* v. *Mayor of N. Y.*, 109 U. S. 385. The assimilation of this duty to the former would merely prevent a municipality from shielding itself behind an independent contractor. For another ground for reaching the desirable result of the principal case, see 15 HARV. L. REV. 486.

PATENTS — INFRINGEMENT — PATENT ON IMPROVEMENT ISSUED PRIOR TO PATENT ON ORIGINAL DEVICE. — An inventor applied for a patent on device A. Pending proceedings, he applied for and obtained a patent on an improvement consisting of a combination of device A with B. Subsequently he was granted the patent first applied for. After the expiration of the patent on the combination, the defendant used this combination. Thereupon an assignee of the two patents sought to enjoin him on the ground that he was infringing the unexpired patent on A. *Held*, that upon the expiration of the patent on the combination of A and B the patentee has no further rights in that combination notwithstanding the validity of his unexpired patent upon A. *Thomson-Houston Electric Co.* v. *Illinois Tel. Const. Co.*, 143 Fed. Rep. 534 (Circ. Ct., N. D. Ill.).

There are two possibilities. Device A may have been an essential element of the prior patent on A B, or it may not have been. On the latter assumption the subsequent patent on A was warranted, and any user of that device before the patent thereon expired, would constitute a violation of the patentee's rights. However, A was apparently an essential element of the prior patent, since that patent is treated merely as an improvement. Therefore the subsequent grant of letters patent on A alone must have been void, since it would amount to double patenting. *Palmer Pneumatic Tire Co.* v. *Lozier*, 90 Fed. Rep. 732. While, therefore, the decision of the court that the use of the improved device after the expiration of the first patent was lawful, seems correct, the assumption that device A was still protected is open to question. The patentee cannot lose his exclusive rights in the improvement and at the same time retain those rights in that which forms the basis of the improvement.

PLEADING — DEMURRERS — ALLEGATION OF FOREIGN LAW. — A New York declaration to which there was a demurrer contained an erroneous allegation as to Maryland law. *Held*, that the demurrer does not admit the truth of an allegation as to the law of another state. *Knickerbocker Trust Co.* v. *Iselin*, 185 N. Y. 54.

This decision appears unique. The exact opposite is well-established law. *Liegeois* v. *McCracken*, 10 Fed. Rep. 664. Foreign laws, not being within judicial cognizance, must be proved as facts on trial; but, once having been proved in evidence, no witness can conclude the court as to their proper interpretation. *Laing* v. *Rigny*, 160 U. S. 531; *Eastern Building & Loan Assn.* v. *Williamson*, 189 U. S. 122. In the principal case it is decided as a mere "corollary" of that proposition that no demurrer to an allegation of foreign law can be final. And for this is quoted, as authority, a case absolutely distinguishable. *Cf. Finney* v. *Guy*, 189 U. S. 335. In that case a plaintiff, having in his declaration set out sections of foreign statutes, added a further allegation as to their intent. Upon demurrer the statutes were held admitted as alleged; but being now before the court exactly like facts proved on trial, the added allegation as to their meaning was of matter come within judicial cognizance, and therefore not admitted by demurrer. In the principal case, on the contrary, the allegation of foreign law stood wholly apart from proved facts, and being therefore outside the court's judicial notice, should have been admitted by demurrer.

POLICE POWER — EXTENT — STATUTE SEPARATING WHITES AND NEGROES IN PRIVATE INSTITUTIONS OF LEARNING. — A Kentucky statute made it an offense to conduct any institution of learning in which both white and colored persons were received as pupils unless it was conducted in separate branches. *Held*, that the statute is valid as a reasonable exercise of the

police power in so far as it prevents the attendance of members of the two races at the same time and in the same place. *Berea College* v. *Commonwealth*, 94 S. W. Rep. 623 (Ky.).

That reasonableness is the test in determining the validity of statutes passed in the exercise of the police power is well established. See 17 HARV. L. REV. 275. Many statutes aimed at accomplishing the separation of the white and colored races in several relations in life have been held constitutional on this ground. Thus intermarriage between the races is forbidden in several states. *Ex parte Hobbs*, 1 Woods (U. S. C. C.) 537; *State* v. *Gibson*, 36 Ind. 389. Statutes have also made it unlawful for members of one race to travel in railway compartments provided for the other, or for railway companies to fail to provide separate compartments. *Plessy* v. *Ferguson*, 163 U. S. 537. Similarly, separation of the races in the public schools has been permitted. *Cisco* v. *School Board*, 161 N. Y. 598. In the present case the court bases its judgment on the same argument used to support the statutes just referred to, — namely, the reasonableness of preventing relations which might lead to intermarriage and to breaches of the peace, — but, as the present statute extends to private institutions, the decision apparently goes further than in any previous case, and probably reaches the limit.

RIGHT OF PRIVACY — INFRINGEMENT — UNAUTHORIZED PUBLICATION OF PORTRAIT. — Post cards illustrating imaginary scenes in the life of the plaintiff, including views of herself, were published and sold without her consent and against her objections. She applied for an injunction to restrain the sale of the post cards. *Held*, that the plaintiff has established no right to restrain the publication. *Corelli* v. *Wall*, 22 T. L. R. 532 (Eng., Ch. D., May 10, 1906).

The English law has refused to restrain the unauthorized use of a name for advertising. *Dockrell* v. *Dougall*, 78 L. T. 840. But the right of a private person to restrain the unauthorized publication of a portrait of himself has been left undetermined. See *Monson* v. *Tussauds*, [1894] 1 Q. B. 671. The present decision, however, seems to settle the English law for the present against allowing such restraint, thus differing from the latest decision in this country. See 18 HARV. L. REV. 625.

TAXATION — TAX ON SUCCESSION TO PROPERTY BY BEQUEST — ASSIGNMENT OF LEGACY BY COLLATERAL LEGATEE. — A testator having bequeathed his residuary estate to persons who were also recipients of general legacies, the heir at law and next of kin prepared to contest the will. A compromise was effected whereby, in consideration of an assignment by the legatees of their residuary interest in the estate, the heir at law and next of kin consented that the will should be admitted to probate. *Held*, that the succession tax should be assessed at the same rate as if the residuary legacy had originally been to the next of kin and heir at law. *In re Cook's Estate*, 99 N. Y. Supp. 1049.

The court seeks support for this decision in a previous New York case. *Matter of Wolfe*, 89 App. Div. 349, affirmed in 179 N. Y. 599. But that case decided merely that when the original legatees, subject to the higher tax rate, refused to accept the legacy, thus allowing it to fall into the general residue and pass as part thereof, it should be taxed at the lower rate provided for the succession which actually took place. As a legatee may of course refuse a legacy, that decision was manifestly correct. But in the principal case there was no refusal, and by the terms of the will, as finally probated, the legacy went to the original collateral legatees, passing from them only by their assignment. It seems a substantial injustice to the state that its rights should thereby be defeated. A Pennsylvania case is directly in accord with the present decision. *Pepper's Estate*, 159 Pa St. 508; see *Frank's Estate*, 9 Pa. Co. Ct. 662. On principle, however, supported by some authority, the case seems clearly wrong. *Harrison* v. *Johnston*, 109 Tenn. 245.

TRUSTS — POWERS OF TRUSTEE — POWER TO GIVE A LEASE WHICH MAY EXTEND BEYOND THE TRUST TERM. — A trustee under a will devising realty to her with power to sell, and further providing that if the trustee made no sale. the property on her death should go to a third party with power to sell, leased

the land to the plaintiffs for a term of years. The plaintiffs entered and improved the property. The trustee died before the expiration of the term, and the third party sold to the defendants, who had notice of the lease. The defendants brought summary proceedings, and the plaintiffs sought an injunction. *Held*, that the relief should be granted. *Butler* v. *Topkis*, 63 Atl. Rep. 646 (Del., Ch.).

Generally a power to sell does not by implication include a power to lease. *Waldron* v. *Chasteney*, 2 Blatchf. (U. S. C. C.) 62. But where the land is vested in trustees, with the intention that they shall raise an income therefrom, a power to lease may be implied where it is reasonable and necessary. *Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35; *Hutcheson* v. *Hodnett*, 115 Ga. 990. A lease, however, or a covenant of renewal, will generally not be upheld for a term greater than the life of the trust estate. *Bergengren* v. *Aldrich*, 139 Mass. 259; *Gomez* v. *Gomez*, 81 Hun (N. Y.) 566. Yet in a few instances the courts have sustained such a lease where the life of the trust estate was indeterminate. *Greason* v. *Keteltas*, 17 N. Y. 491. In the case at hand the power to sell seems to be permissive only; a lease, therefore, cannot be said to be in conflict therewith. It seems clearly a case where equity in the exercise of its discretion should favor a lessee who in good faith has made improvements, as against a purchaser, with notice of the lease, from the remainderman.

WILLS — REVOCATION — EFFECT OF REVOCATORY WORDS ON BACK OF WILL. — After the testator's death there was found on the back of his will a signed, but unwitnessed, statement that it was revoked. *Held*, that under the New York statute which permits revocation by burning, tearing, cancelling, obliterating, or destroying, this does not amount to cancellation of the instrument. *Matter of Miller*, 50 N. Y. Misc. 70.

The majority of cases in this country hold that the writing of a revocation is not effectual as a cancellation unless it cancels some material part of the writing in the will. *Howard* v. *Hunter*, 115 Ga. 357. Accordingly, words of revocation in the margin of the will have been held not enough. *Lewis* v. *Lewis*, 2 Watts & S. (Pa.) 455. This is true, even though these words slightly touch a part of the writing in the will, provided that part is immaterial. *Matter of Akers*, 74 N. Y. App. Div. 461; *Oetjen* v. *Oetjen*, 115 Ga. 1004. In Vermont, however, revocatory words have been held effective as a cancellation when written on the back of the page containing the material parts of the will. *Warner* v. *Warner's Estate*, 37 Vt. 356. Such a decision might possibly be reconciled with the main body of authority by the consideration that the words were written upon a part of the paper that could not be detached so as to leave the material matter intact. See *Will of Mary Ladd*, 60 Wis. 187. But the present decision, which is squarely contrary to the Vermont case, adopts what is probably the soundest construction of statutes similar to that in New York by requiring that the revocatory words be actually written over a material part of the will.

WITNESSES — PRIVILEGE AGAINST SELF-CRIMINATION — CONSTRUCTION OF STATUTE. — A Wisconsin statute provided that a witness under certain circumstances should not be excused from testifying on the ground that his testimony might tend to criminate him, but that he should not be prosecuted on account of anything concerning which he might testify. *Held*, that the statute is no broader than the constitutional guaranty against self-crimination, and therefore gives no immunity for testimony not in fact self-criminatory, or for testimony not given under compulsion. *State* v. *Murphy*, 107 N. W. Rep. 470 (Wis.). See NOTES, p. 61.